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No. 09-901

IN THE

Supreme Court of the United States

CABLEVISION SYSTEMS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* C-SPAN IN SUPPORT OF PETITIONER

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National Cable Satellite Corporation d/b/a C-SPAN ("C-SPAN") submits this *amicus curiae* brief in support of the Petition for a Writ of Certiorari.[1]

INTEREST OF *AMICUS CURIAE*

C-SPAN is a private, non-profit company created in 1979 by the cable television industry as a public service. C-SPAN receives no government funding; operations are funded by fees paid by cable and satellite affiliates who carry C-SPAN programming. C-SPAN is a non-profit educational organization with a board of directors comprised of executives from large and small cable television operating companies. Today, its round-the clock programming is available to 99.1 million television households.

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[1]Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* state that they and *amicus* authored this brief and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission. Mr. Sokler, counsel for *amicus curiae* C-SPAN, has long served as counsel for C-SPAN, including in *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994), *Turner Broadcasting v. FCC*, 520 U.S. 180 (1997), and *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008), all involving the must-carry statute at issue here. Mr. Sokler is a member of the law firm Mintz Levin; other members of Mintz Levin are among the counsel for Petitioner. Neither Mr. Sokler nor any other of *amicus's* counsel or *amicus* had any role in the drafting of the Petition for a Writ of Certiorari for Petitioner, and counsel for Petitioner had no role in the drafting of this *amicus* brief. All parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the clerk.

C-SPAN2 began covering live United States Senate debates in 1986 and is now available to 87.1 million television households. In addition, C-SPAN2 offers long-form coverage of current events and issues, and during the weekends, telecasts *Book TV*—48 hours of non-fiction book programming. Launched in January, 2000 as a digital-only service, C-SPAN3 offers additional public affairs programming. Weekdays, C-SPAN3 offers public affairs events from Washington and around the country, including committee hearings, press conferences, and speeches from political leaders, frequently on a live basis. On weekends, C-SPAN3 spotlights American history. It is now available to 31.1 million digital households.

C-SPAN has been a consistent and active opponent of the must-carry statute that infringes its First Amendment rights as a speaker. C-SPAN was one of the parties that challenged the must-carry statute immediately after it was enacted in *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*) and *Turner Broadcasting, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*). C-SPAN has also challenged FCC regulations that interpreted and expanded the reach of the must-carry statute. *C-SPAN v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

SUMMARY OF ARGUMENT

Facts are not immutable. They often evolve and change over time. Such is the case in what the *Turner II* plurality recognized was "the complex and fast-changing field of television." *Turner II*, 520 U.S. at 224. This Court has long recognized that a change in the facts can alter the analysis of whether a statute is constitutional: "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). C-SPAN agrees with Petitioner that the time has come for this Court to reassess whether the must-carry statute can still be justified despite the First Amendment abridgements that it inflicts.

C-SPAN has always asserted that the establishment of a hierarchy of speakers, whereby broadcasters are guaranteed cable carriage under the must-carry regime while cable programmers like C-SPAN must compete for whatever carriage remains, cannot be justified under the First Amendment. C-SPAN believes, as courts have already begun to recognize, that the factual underpinnings supporting must-carry have evaporated. As a consequence, the gamesmanship that the must-carry regime has created, in which a home shopping station can manipulate the must-carry rules to reach a whole new cable audience far beyond its broadcast market and thereby bump a cable programmer like C-SPAN, should not be permitted to continue.

ARGUMENT

"There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and provisions of the First Amendment." *Turner I*, 512 U.S. at 636. "By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. *Id.* at 636-37 (emphasis added). *See also Turner II*, 520 U.S. at 226 (Breyer, J., concurring) (must-carry "extracts a very serious First Amendment price . . . [which] amounts to a 'suppression of speech'") (citations omitted); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) (finding that must-carry rules violate First Amendment rights of programmers due in part to "the fact that [a broadcaster] is guaranteed a channel even if carriage effectively bumps a cable programmer").

C-SPAN has always asserted that the establishment of a hierarchy of speakers, whereby broadcasters are guaranteed cable carriage under the must-carry regime while cable programmers like C-SPAN must compete for whatever carriage remains, cannot be justified under the First Amendment. This Court in its *Turner* decisions reached the opposite conclusion. In doing so, the plurality in *Turner II* made clear that its task was to

determine whether "the legislative conclusion [enacting must-carry] was reasonable and supported by substantial evidence in the record before Congress." *Turner II*, 520 U.S. at 211; *see also Turner I*, 512 U.S. at 665-66. This deference to Congress permitted the plurality to justify the First Amendment abridgement that must-carry inflicts upon programmers "regardless of whether the evidence is in conflict." *Id.*

Facts, however, are not immutable. They often evolve and change over time. Such is the case in what the *Turner II* plurality recognized was "the complex and fast-changing field of television." *Turner II*, 520 U.S. at 224. This Court has long recognized that a change in the facts can alter the analysis of whether a statute is constitutional: "the constitutionality of a statute predicated upon the existence of a particular state of acts may be challenged by showing . . . that those facts have ceased to exist." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938). C-SPAN agrees with Petitioner that the time has come for this Court to reassess whether the must-carry statute can still be justified despite the First Amendment abridgements that it inflicts.

Courts are already recognizing that "many significant changes . . . have occurred [in the marketplace] since 1992," which is when Congress made the findings that underlie the must-carry statute. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (noting "evidence of ever-increasing competition among video providers."). In setting aside regulations implementing another part of the 1992 Cable Act (which included the must-carry regime), the D.C. Circuit in *Comcast* also recognized

that "[c]able operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992," *id.*, and that "satellite television companies, which were bit players in the early 90s, now serve one-third of all subscribers. *Id.* at 3.

C-SPAN contended in the *Turner* litigation that simple A/B switches were a less-infringing alternative that preserved subscriber access to over-the-air broadcast stations. In 1992, Congress concluded that the use of A/B switches was "not an enduring or feasible method of distribution and . . . not in the public interest." *Turner II*, 520 U.S. at 219. In *Turner II*, the plurality concluded that "Congress' decision that use of A/B switches was not a real alternative to must-carry was a reasonable one based on substantial evidence of technical shortcomings and lack of consumer acceptance." 520 U.S. at 221. But the world has changed since then. Over-the-air television migrated from analog to digital in June 2009. *See* FCC News Release, "Full-Power TV Broadcasters Go All-Digital," June 13, 2009. In the digital world, A/B switches are "built into television receivers and can be easily controlled from a TV remote control device." *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15102 ¶ 16 (1998).

The preference given to broadcasters in the hierarchy of speakers created by the must-carry statute is even more pronounced today. In 1992, cable operators basically offered only one or two tiers of so-called "analog" service. Now, cable operators offer consumers additional "digital" tiers. Because the analog tiers have been filled, most newer

services, for example C-SPAN 3, obtain carriage, when they do, on digital tiers that have fewer subscribers. Under the must-carry statute, however, broadcasters are entitled to carriage on the most widely distributed analog tiers. *See* 47 U.S.C.§ 534(b)(7).

The First Amendment harm inflicted upon C-SPAN (and other similarly situated programmers) by the statute's operation is far from theoretical. Indeed, between June 1993 and the end of the 1990s, 12 million cable homes lost all or some access to C-SPAN's public service programming as cable operators were forced to make room on their systems to carry hundreds of additional broadcast stations. In the instant case, the compelled carriage of WRNN sets up C-SPAN and other non-broadcast programmers to face the same fate again: risk being moved off of or dropped entirely from carriage on the most widely distributed tier of cable service.

Cablevision was in no way a "bottleneck" preventing WRNN from reaching its intended audience in the Hudson Valley area of Kingston, New York. Cablevision does not operate at all in Kingston, New York; to the contrary, Cablevision's Long Island cable systems lie as much as 195 miles away from Kingston. *See* Petition at 10 and Pet. App. 66a, n.11. But owing to the absurd incentives of the must-carry statute, and in an action that furthers none of the objectives that Congress identified as important when enacting must-carry in 1992, WRNN moved its antenna 50 miles to the south in order to extend the reach of its over-the-air signal. *See* Pet. App. 9a, 38a, ¶ 11. If the statute is allowed to operate, WRNN will have extended its home shopping programming to a new cable

audience that never would have seen its over-the-air signal, and Cablevision will be deprived of its editorial rights. C-SPAN will either lose its audience (if it is dropped) or have its audience reduced (if it is moved to a less widely distributed tier). The First Amendment should not be tossed aside to permit this type of gamesmanship.

Programmers like C-SPAN only want the opportunity to compete in the marketplace of ideas. The First Amendment, absent circumstances no longer present here, should guarantee them the right to compete for that opportunity.

CONCLUSION

Amicus curiae C-SPAN respectfully asks that the Court grant the Petition.

Respectfully submitted,

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